RECORD AND BRIEFS

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SUPREME COURT, U.S.

No. 15-1485

IN THE

Supreme Court of the United States

DISTRICT OF COLUMBIA, ANDRE PARKER, AND ANTHONY CAMPANALE,

Petitioners,

v.

THEODORE WESBY, *et al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

REPLY BRIEF FOR PETITIONERS

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REPLY BRIEF FOR PETITIONERS

Settled Fourth Amendment principles call for reversal. Officers have probable cause to arrest whenever the totality of the circumstances, objectively viewed from their perspective, shows a fair probability of criminal activity. *Kaley v. United States*, 134 S. Ct. 1090, 1103 (2014); *Maryland v. Pringle*, 540 U.S. 366, 371 (2003). That is "not a high bar." *Kaley*, 134 S. Ct. at 1103. Probable cause is "practical and common-sensical," and looks to how "reasonable and prudent people, not legal technicians," would perceive a potential crime. *Florida v. Harris*, 568 U.S. 237, 244 (2013) (brackets omitted). It requires neither "a prima facie showing" of criminal activity, *Illinois v. Gates*, 462 U.S. 213, 235 (1983), nor "the same type of specific evidence of each element of the offense as would be needed to support a conviction," *Adams v. Williams*, 407 U.S. 143, 149 (1972). And, critically, the evidence may be circumstantial; indeed, it usually must be as to a suspect's state of mind. *United States v. Santos*, 553 U.S. 507, 521 (2008) (plurality op.).

Respondents do not deny that the court of appeals departed from these principles, nor do they defend those departures. While respondents try to reconcile their position with settled law, their attempt simply reveals how much they misapply it. Meanwhile, they cannot salvage an entitlement to trial through a last-ditch effort to dispute some facts for the first time in their brief on the merits in this Court. Those disputes plainly come too late. And they are academic in any event, because there was probable cause as a matter of law based just on the facts respondents agree even now are undisputed plus those directly stated, with their prior agreement, in the questions on which this Court granted certiorari.

The existence of probable cause resolves this case. But if there is any doubt, petitioners are entitled to qualified immunity. Despite respondents' strained arguments for trial, probable cause was at least arguable. The on-scene officers should not be liable for a million-dollar judgment.

ARGUMENT

I. Considered From The Perspective Of A Reasonable Officer On The Scene, The Totality Of The Circumstances Provided Probable Cause To Arrest.

A. The officers had a reasonable basis to arrest for trespass.

After the officers responded to, then investigated, a complaint about a home intrusion, they had ample reason to think that those found inside knew or at least should have known that they had no right to throw their unauthorized, debauched party in this unfurnished, unattended home. This was especially true given the partiers' suspicious behavior after the officers arrived and their reliance on the purported invitation of an absent host known only as "Peaches," who proved evasive and untruthful.

Probable cause to arrest for trespassing is based on the totality of the circumstances, viewed from the common-sense perspective of a reasonable officer on the scene who cannot see into a suspect's mind. Because there was probable cause as a matter of law given the facts properly treated as undisputed (*see infra* at 15-19), this Court should reverse for entry of judgment for petitioners.

1. As the officers knew, the partiers lacked the right to be in the home, had obvious reasons to think so, and acted suspiciously.

a. Beginning with the fact that the partiers entered the home without actual permission, it was reasonable to infer that they either knew or at minimum should have known that they lacked authority to be there. In many situations, police officers assessing probable cause—and even juries considering reasonable doubt—may infer a culpable state of mind from the act itself. (Pet. Br. 17-18.) This case is no exception, since it is undisputedly rare that someone would enter a private home while reasonably unaware he actually lacks permission. (*Compare* Pet. Br. 17-18, *with, e.g.*, Resp. Br. 34-35 (discussing party invitations made *with* authority to invite).) A prudent, experienced officer could believe the straightforward explanation: respondents were trespassing, knowingly or at least negligently.

Of course, officers will usually have facts beyond that of unauthorized presence in a home, and so an inference of *mens rea* from *actus reus* might not always be reasonable. Respondents argue, for instance, that an apparent trespasser might lack criminal capacity due to age or insanity. (Resp. Br. 48.) But there was no claim of incapacity here, or anything else that would make the inference unreasonable. To the contrary, the surrounding circumstances heavily strengthened the inference. (*See infra* at 5-11.) As the District of Columbia Court of Appeals recognized in discussing another trespass statute, "it would be an unusual case" where the unlawful act was undoubtedly proven but the requisite *mens rea* so clearly lacking that police could not even arrest.

Tillman v. Wash. Metro. Area Transit Auth., 695 A.2d 94, 96 (D.C. 1997).[1]

Respondents also argue that inferring *mens rea* from the act of trespassing is "more inappropriate in a landlord-tenant context." (Resp. Br. 48.) This argument might bear weight if this were such a situation. But the officers knew from Mr. Hughes, the homeowner, that there was no lease, that "Peaches"—the party's purported host—was not a tenant, and that *no one* was authorized to be inside the home. (Pet. Br. 4-5.) Whatever inferences might be drawn when a hypothetical tenant overstays her lease (Resp. Br. 48, 57), that was not what the officers encountered here. Similarly, though respondents assert that the house was "secured with a lock and key" (Resp. Br. 38), the evidence is just that one of the partiers had seen "Peaches" with keys—not that the officers knew as much (J.A. 41).

Moreover, the mere possibility of an innocent explanation for an act that would otherwise be criminal does not preclude police officers from inferring culpability from the *actus reus* for purposes of probable cause. While a prosecutor might ultimately decline to bring charges, or a jury might find reasonable doubt, this case is about whether an officer may arrest in the first instance. The officer, assessing the totality of the

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[1] Contrary to respondents' claim, petitioners do not argue that probable cause categorically exists "*whenever* someone enters a private home without the permission of the owner." (Resp. Br. 47-48.) Similarly, despite respondents' claim (Resp. Br. 10-11), the parties agree that, for probable cause, an officer must have at least "some evidence" on each element of an offense (Resp. Br. 15 n.3). The proper approach, though, is not that of a lawyer, but of a reasonable officer viewing the totality of the circumstances. (Pet. Br. 35-36.)

circumstances in real time, does not have to conclusively rule out the possibility of innocent behavior before arresting.

b. Of course, there was much more to support an inference of respondents' culpability here. Responding to neighbors' complaints, officers found a large party, late at night, in a vacant home with naked and scantily clad women, evidence of illegal drug use and prostitution, and no owner or tenant present. (Pet. Br. 2-4.) Nothing at all suspicious, respondents insist. In reality, these were clear indicators to the partiers that their presence was unauthorized, or so a reasonable officer might conclude.

First, it reasonably appeared that no one was living in the home. Respondents do not deny that the only pieces of furniture were some folding chairs downstairs and a mattress on the floor upstairs. (Resp. Br. 37.) Even if the windows had shades, candles were lit, and some utilities were working (Resp. Br. 37), the home was basically unfurnished. And respondents do not dispute that the house was in disarray, with cups littering the floor and open and used condoms lying around. (Pet. Br. 3; J.A. 165; C.A. App. 87.) The home's appearance thus strongly indicated that the only actual use of the house was for the party, not habitation. The natural conclusion, or at minimum a reasonable one, was that the partiers were taking advantage of the fact that the home was vacant and thus unguarded against their late-night entry. (Pet. Br. 19; U.S. Br. 16.)

Notably, respondents largely abandon the court of appeals' explanation for the home's condition: that the home had a new tenant who had not yet moved in but chose to throw, then leave, a party for people who did not know her name. (Pet. App. 16a-17a.) Respondents

now suggest that perhaps the tenant could not afford furnishings. (Resp. Br. 38-39.) The officers were not required, on the scene, to anticipate and accept this alternative explanation either. While such an instance might conceivably occur, it still remained a reasonable inference that this house was uninhabited, and obviously so.

Second, the evidence of illegal drug use and prostitution was another sign to the partiers that the person lawfully in charge of the home did not authorize their presence. Respondents admit the party was "licentious" (Resp. Br. 3), and the officers had evidence of the conspicuous exchange of money for sexual acts (Pet. Br. 3). While respondents argue that marijuana is commonly used today (Resp. Br. 53), its possession was unquestionably criminal under District law at the time, *see* D.C. Code §§ 48-902.08(a)(6), 48-904.01(d) (2008). Common sense indicates that a typical homeowner or renter would not permit strangers to engage in illegal activities in his or her home for many reasons, including legal risks of a nuisance or eviction proceeding. (Pet. Br. 20-21; U.S. Br. 16.)

Contrary to respondents' arguments, an experienced officer could reasonably perceive that illegal drug use and prostitution are directly connected with unlawful presence in a vacant home. These are activities that would lead to arrest if done in public and thus need to be concealed by those wishing to engage in them. (Pet. Br. 19-20.) A vacant home provides a prime location to engage in such behavior without detection. Although this proposition *is* supported by empirical study (Pet. Br. 19), respondents are wrong to suggest that empirical evidence is even necessary (Resp. Br. 53). *See Illinois v. Wardlow*, 528 U.S. 119, 124-25 (2000) (disclaiming any need for

"empirical studies" and "scientific certainty" in drawing inferences from suspicious behavior).

Third, the absence of any owner or tenant—or even the party's alleged host—was itself highly suspicious. Respondents protest that "Peaches," whom some partiers identified as the host, told police that she had just gone to the store. (Resp. Br. 36.) Perhaps. But at that time of night—around 2:00 a.m.—an officer could find that explanation far-fetched and think it likelier that she had simply gone to her actual home for the night. Moreover, regardless of any explanation given for her absence, it was reasonable to believe that the lack of any purported owner or tenant at the party provided the partiers some notice that they did not have actual authority to be there, especially given the nature of this party.

In any event, respondents' attempt to explain away these facts as unsuspicious and unremarkable does not *obviously* succeed, to say the least. While respondents claim that this was "a typical, if licentious, house party in a low-income neighborhood" (Resp. Br. 40), the neighbors who complained to police about the disruption to their community and "illegal activities" (J.A. 112) presumably disagreed. And a reasonable officer might fairly conclude that the home's condition and the conduct of the partiers amply supported the inference that they knew or should have known that they did not have valid permission to be there.

c. The partiers' interaction with the police provided still more evidence of culpability. Respondents minimize the fact that they scattered and hid when police entered (Resp. Br. 51-52), but attempted flight from police plainly supports probable cause. *Peters v. New York*, 392 U.S. 40, 66-67 (1968). Moreover, petitioners are not relying on flight "standing alone"

with no information "relating the suspect to the evidence of crime." (Resp. Br. 51.) There was not only the completed *actus reus*—the partiers entered the home without the owner's permission—but also the other incriminating circumstances surrounding the entry. It is respondents who wish to consider the fact of flight "standing alone," in isolation from the other circumstances known to the officers. This Court has consistently rejected such a divide-and-conquer approach. *See, e.g.*, *Pringle*, 540 U.S. at 372 n.2.

Despite respondents' alternative explanations (Resp. Br. 51-52), the partiers' flight was evidence of a culpable mental state. Respondents do not claim that they failed to recognize that uniformed officers were at the door. *Cf. Wong Sun v. United States*, 371 U.S. 471, 482-83 (1963). Nor did the officers' actions here give innocent persons reason to flee in fear, as respondents argue. (Resp. Br. 52.) The officers knocked on the door; they did not batter it down or force it open. (J.A. 92-93.) There is no suggestion that they said anything particularly threatening or alarming. The officers did not enter the home in "droves" (Resp. Br. 52), and they were quite outnumbered by the (at least) 21 partiers (J.A. 133, 155; Pet. App. 47a-48a). Moreover, one partier fled on the officers' mere approach, before they could have even done anything alarming to innocent persons. (J.A. 112.)

While respondents suggest that maybe not every partier fled (Resp. Br. 52), that does not negate the evidence of flight or the inferences a reasonable officer could draw from it. (U.S. Br. 16-17.) Because the partiers were closely associated together in a common activity in a private home, it would be reasonable to think that they would have had similar information

about the illegitimacy of any received invitation. The flight of some would thus support probable cause for all. *See Pringle*, 540 U.S. at 372-73; *United States v. Briggs*, 720 F.3d 1281, 1290-92 (10th Cir. 2013).

Adding to the suspicion was the partiers' difficulty explaining who had permission to invite them into the home. (Pet. Br. 4; U.S. Br. 17-18.) Even if invitees sometimes bring additional guests (Resp. Br. 35), the partiers here still should have been able to state, or state consistently, who had given them permission to be there. Those who are invited to join a party typically know—or at minimum *should* know—who purports to have a right to invite them into the house. A prudent officer could believe that the partiers were attempting to obfuscate the investigation, or that they revealed a glaring disregard for how they could legitimately be in someone else's home. Either way, an officer would have good reason to believe that they knew or should have known they lacked authority to be there.

2. To a reasonable officer on the scene, the partiers' reliance on "Peaches" and her purported invitation would not undermine probable cause but reinforce it.

a. The partiers' reliance on "Peaches" provided affirmative evidence of culpable *mens rea*. Because the partiers and "Peaches" had a common enterprise in together using the home for the party, her knowledge that they all lacked the owner's permission may be imputed to the partiers. (Pet. Br. 23-24.) To distinguish *Pringle* on this point, respondents argue that they were not similarly situated to "Peaches" because she was the party's host. (Resp. Br. 55.) But this Court in *Pringle* rejected a similar distinction among car occupants; it upheld probable cause to

arrest someone who was not the driver, the car owner, or the passenger in the backseat where the drugs were located. 540 U.S. at 368. The fact that "Peaches" eventually admitted knowing that the entry was unauthorized did not dispel her common enterprise with the partiers or the likelihood that such knowledge had been shared among them. (Resp. Br. 55.) Indeed, respondents do not question the many common-sense reasons why such knowledge would have been shared to further their enterprise. (Pet. Br. 23.)[2]

Respondents also argue that their claim of legitimate invitation from "Peaches," even if discredited, cannot be "affirmative proof of their guilty state of mind." (Resp. Br. 32-33, 54.) But surely it can. Respondents are incorrect that the officers would have to "disregard" how suspicious "Peaches" was "in the probable cause analysis," as if the partiers had never relied on her. (Resp. Br. 33.) Both the totality-of-the-circumstances test and other well-established law provide that false exculpatory statements can be "affirmative evidence of guilt." *Wright v. West*, 505 U.S. 277, 296 (1992) (plurality op.); *accord Wilson v. United States*, 162 U.S. 613, 620-21 (1896).

Since the partiers had used "Peaches" to justify their presence, her evasive and untruthful behavior when questioned about it gave the officers reason to believe that she and the partiers had together fabricated an exculpatory story. At the least, her

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[2] Despite respondents' allusion to forfeiture (Resp. Br. 54), petitioners maintained below that the behavior of "Peaches" was evidence of respondents' culpability. (*E.g.*, C.A. Appellants' Br. 29-30.) The issue is properly before this Court in any event because the court of appeals relied upon the supposed invitation from "Peaches" even though she admitted she lacked authority to extend it. (Pet. App. 11a-12a.)

manifest unreliability suggested that the partiers already knew or should have known that her authority to extend the invitation was suspect. These are the types of reasonable credibility judgments that officers may make in assessing *mens rea* on the scene of an apparent crime.

b. Even if the partiers' reliance on "Peaches" was not affirmative evidence of guilt, a reasonable officer did not have to accept it as conclusive evidence of innocence. Although respondents argue that "Peaches" corroborated the purported invitation (Resp. Br. 30-31), she was evasive, repeatedly hung up the phone, and refused to come to the house because she said she would be arrested. (Pet. Br. 4.) She also blatantly lied to police and had trespassed herself. (Pet. Br. 4.) Respondents do not address the fact that she had amply demonstrated her lack of credibility. (Pet. Br. 24-25; U.S. Br. 19.) Nor do they address her lack of accountability, given that police did not have her real name and she would not make herself available in person. (Pet. Br. 24-25.) A reasonable officer could therefore consider respondents' story, at minimum, uncorroborated.

That leaves respondents' untenable argument that their explanation for being in the home was "unrebutted." (Resp. Br. 30.) Respondents argue that "[t]here was no evidence suggesting" that the statements of some that "Peaches" had invited them might have been untrue. (Resp. Br. 30.) This argument simply ignores all of the previously discussed evidence gathered during the investigation, all of which controverts their innocent explanation. Just as a juror

would not have to credit it, neither did an on-scene police officer. (U.S. Br. 18-19.)[3]

Finally, respondents' argument simply does not address the question whether, even if there had been an invitation, their reliance on it was reasonable. Once again, the information known to the officers reasonably indicated otherwise: the partiers at least should have known that the homeowner had not authorized the invitation or their presence.

B. Like the court of appeals, respondents apply a version of probable cause that is too demanding, inflexible, and impractical.

1. Respondents do not dispute that, in reaching a different conclusion on these facts, the court of appeals departed from standard Fourth Amendment principles. Specifically, they do not defend how the court required probable cause as to each element of a crime, rather than for the crime as a whole. (Pet. Br. 35; Resp. Br. 15 n.3.) Nor do they defend how the court heightened the probable-cause analysis by reasoning that a suspect's claimed excuse defeats probable cause absent "conflicting information" in the form of direct rather than circumstantial evidence of the suspect's mental state. (Pet. Br. 27-35.)

While not defending what the court of appeals did, respondents nevertheless seek to maintain a heightened standard—one that is likewise too

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[3] Respondents again erroneously claim that petitioners propose a categorical rule: that officers *never* need credit the accounts of those on the scene. (Resp. Br. 31.) Not so. While the Fourth Amendment's reasonableness standard gives officers substantial leeway to evaluate claims of innocent mental states (Pet. Br. 27-31), whether it is reasonable to discredit such a claim depends, as always, on the totality of the circumstances.

demanding and unrealistic and gives undue weight to suspects' accounts. Respondents reject the circumstantial evidence of culpability in this case as "no evidence" at all. (*E.g.*, Resp. Br. 46.) Piece after piece of evidence, they insist, is not even "[p]robative." (Resp. Br. 47, 49, 51, 53.) The only explanation for this is that respondents are applying in practice a heightened probable-cause standard that they have disavowed in theory. Indeed, at points, they argue about what is needed for "criminal liability" rather than just probable cause. (*E.g.*, Resp. Br. 49.)

The flaws in respondents' analysis are apparent. After one fleeting acknowledgment of the totality-of-the-circumstances test (Resp. Br. 11), respondents isolate each fact upon which petitioners rely to support culpability. (Resp. Br. 32-40, 46-56.) They then posit an alternative explanation for the isolated fact that is consistent with an innocent mental state. (Resp. Br. 32-40, 46-56.) Upon doing so, respondents eliminate the fact from consideration, denying it any weight in the probable-cause inquiry. (Resp. Br. 32-40, 46-56.) Under respondents' analysis, it matters not that an alternative explanation could seem implausible to a reasonable officer based on his judgment, experience, and direct observations. But even if individual facts viewed in isolation might seem ambiguous, in combination—that is, in the totality of the circumstances—they can paint a clear enough picture for probable cause. *Pringle*, 540 U.S. at 372 n.2.

This is not a case where, as respondents suggest, the officers "close[d] their eyes" or ears to the partiers' explanation for their presence and then arrested indiscriminately. (Resp. Br. 32.) To the contrary, the officers investigated the partiers' explanation, but received incomplete and inconsistent accounts of who

had permitted them to be there. (Pet. Br. 4.) When eventually some told of "Peaches," officers called her—and called her back even after she repeatedly hung up on them and refused to return to the house. (Pet. Br. 4.) Following up on those conversations, officers spoke to Mr. Hughes, the homeowner, as well. (Pet. Br. 4-5.) Taking the partiers' explanation into consideration along with the other facts casting doubt on its veracity and reasonableness, an objectively reasonable officer was entitled to discredit the explanation.

2. Although this Court need not analyze District of Columbia Court of Appeals precedent to resolve this case, respondents repeat the error of the court below in expecting officers to have parsed that precedent closely to divine that the putative *mens rea* element of the offense was an element at all. On-scene officers are not lawyers, and should not be treated as such.

As previously explained (Pet. Br. 36-40), a prudent officer could have believed that respondents' explanation of invitation went only to an affirmative defense.[4] Respondents generally fail to address the petitioners' discussion of the case law that would have supported this belief (Pet. Br. 36-38), and instead rely on *Ortberg v. United States*, 81 A.3d 303 (D.C. 2013), a decision that was issued years *after* the arrests and recognized

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[4] This question was presented and decided below (C.A. Appellants' Br. 20-25; Pet. App. 10a-11a) and is fairly included in the probable-cause and qualified-immunity questions presented to this Court as a "predicate to an intelligent resolution" of both, since both analyses depend on the elements of the crime. *Ohio v. Robinette*, 519 U.S. 33, 38 (1996); *see* Sup. Ct. R. 14.1. Moreover, because this Court is the ultimate interpreter of District law, *Pernell v. Southall Realty*, 416 U.S. 363, 368 (1974), it owes no deference to the District of Columbia Circuit (*contra* Resp. Br. 20).

that earlier case law about the culpable mental state "lacked some precision," *id.* at 307. A reasonable officer did not have to predict the analysis in *Ortberg* or the different but no less intricate analysis respondents now propose. (Resp. Br. 17-23.)

Moreover, respondents' argument fails on its own terms. They equate the *mens rea* requirement in *Ortberg* with the pre-existing requirement that the entry be against the owner's "expressed will, that is, after warning to keep off." *McGloin v. United States*, 232 A.2d 90, 91 (D.C. 1967). But the two are quite different. Whether a homeowner has posted a "no trespassing" sign is an entirely distinct question from whether an apparent trespasser actually and reasonably relied on a third-party invitation. It does not appear that the expressed-will requirement even applied to private homes, as opposed to restricted areas of public buildings. *See id.* ("[S]urely no one would contend that one may lawfully enter a private dwelling house simply because there is no sign or warning forbidding entry."). Nothing about the expressed-will requirement resolves whether the claim of invitation here went to an element rather than an affirmative defense.

C. It is too late for respondents to dispute previously undisputed facts.

In their brief on the merits, respondents raise entirely new arguments to dispute some (but not all) of the facts underlying their arrests. (Resp. Br. 27-30.) This effort comes far too late. The petition for writ of certiorari stated these facts, including in the questions presented, and respondents' brief in opposition did not dispute any of them. (*Cf.* Br. in Opp. 20-22, 31 n.3 (disputing other factual assertions).) Nor were these supposed disputes raised below when petitioners

relied upon the same facts to argue for summary judgment in their favor. Following its standard practice, this Court should treat these facts as established.

1. Most notably, respondents newly contest the fact that "Peaches" lacked permission from the homeowner, Mr. Hughes, to invite them. They dispute both that he told an officer that their entry was unauthorized and that "Peaches" admitted to another officer that she lacked authority over the home. (Resp. Br. i, 28-30.) They thus seek, *sub silentio*, to transform this case from one about *mens rea* into one in which the *actus reus* itself is in doubt.

The questions accepted for review, however, specifically include the underlying fact that "the owner . . . inform[ed] police that he ha[d] not authorized entry." (Pet. i.) Indeed, respondents included that fact in their own questions presented and began their brief in opposition by explaining that "[t]his case presents the question whether officers lack probable cause to arrest," where "the police discover that the [alleged invitor] did not in fact possess lawful authority to extend the invitation." (Br. in Opp. i, 1.) Reversing course, respondents now seek to change the terms on which this Court chose to grant review by disputing a fact stated in the questions presented. This they cannot do. *Perez v. Mortg. Bankers Ass'n*, 135 S. Ct. 1199, 1210 (2015); Sup. Ct. R. 15.2; *see also Carcieri v. Salazar*, 555 U.S. 379, 395-96 (2009) (brief in opposition's failure to contest factual assertion in petition "alone is reason to accept this as fact for purposes of [this Court's] decision").

What is more, in the proceedings below, respondents never disputed that "Peaches" lacked authority, thereby forfeiting the issue. *See OBB Personenverkehr*

AG v. Sachs, 136 S. Ct. 390, 397-98 (2015). Indeed, respondents agreed with the district court that "the overall facts were generally undisputed" and quoted with approval that court's statement that the homeowner told an officer both that "['Peaches'] did not have a lease for the property and that [respondents] did not have his permission to be in the house." (C.A. Appellees' Br. 3; *accord* C.A. Oral Arg. Recording 12:47 to 13:00, 20:20 to 20:32 (confirming that Mr. Hughes "had not given permission").) Respondents understandably accepted this fact, having presented no evidence—such as any testimony from "Peaches" or Mr. Hughes—to dispute it.[5]

Given this previously undisputed fact, no more is necessary to justify judgment for petitioners. With the fact that the partiers lacked authority and the other facts respondents do not dispute even now—most notably the state of the house, the nature of the party, and the absence of any host at the scene—the officers had sufficient reason to believe that the partiers knew or should have known they had no right to be there. (*See supra* at 3-7.) Regardless of respondents' remaining attempts to now throw other facts into dispute, judgment for petitioners is warranted.

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[5] Respondents' decision not to dispute this fact earlier is understandable, given that two different officers—one who spoke with both Mr. Hughes and "Peaches," and one with "Peaches"—corroborated each other (J.A. 53-54, 99-100, 165-66); other officers confirmed hearing contemporaneously about those conversations (J.A. 53-54, 131-32); and "Peaches," evincing consciousness of guilt, was evasive and refused to return to the home (J.A. 53-54, 165). Similarly, the weaknesses in respondents' newfound claims of other disputes of fact may help explain why these claims were not raised below.

2. In any event, the other new disputes are also waived or forfeited. First, it is too late for respondents to contest "whether anyone fled or hid from the police." (Resp. Br. 28.) The petition asserted that when "uniformed officers knocked and entered, the people inside scattered into other rooms" and that officers later found "a man hiding in a closet." (Pet. 3, 17.) Opposing the petition, respondents took no issue with this, even agreeing: "The evidence is that when an individual opened the door [for the police], one officer 'could see people in the house scattering into different rooms.'" (Br. in Opp. 23.) So too in the court of appeals, petitioners relied upon this evidence to support their entitlement to summary judgment (C.A. Appellants' Br. 29), without any dispute in respondents' brief. And in the district court, respondents themselves raised on summary judgment the evidence that partiers scattered upon police entry. (J.A. 190.) This fact is established.

Second, while respondents now dispute whether officers smelled marijuana in the home (Resp. Br. 28), they never disputed it previously. The petition so stated without challenge in respondents' opposition. (Pet. 3.) This fact was also presented to the courts below without dispute. (C.A. Appellants' Br. 7-8, 30; J.A. 192.)

And third, it is too late for respondents to dispute receipt of the concerned neighbors' "tip" that the house was supposed to be vacant. (Resp. Br. 27.) The petition described a complaint to police about a loud party and possible illegal activities in a house that had been vacant for several months. (Pet. 3.) The brief in opposition did not dispute this fact. So too below, petitioners asserted that a "neighbor had complained to police about a large, loud party in a house that was

supposed to be vacant," without any objection that the police may never have received such a tip. (C.A. Appellants' Br. 4.)[6]

3. The time for respondents to argue about genuine disputes of fact has long passed. Reaching such disputes now would unfairly prejudice petitioners. In particular, petitioners could have presented additional evidence in the district court to overcome respondents' arguments if they had been timely made, because they are not based on respondents' own affirmative evidence. Even on the existing record, petitioners could have refuted the multiple arguments that respondents now make as to each of the several facts at issue and disproved any genuine dispute, especially given that the arguments are questionable at best.

The Court should decide this case as it was presented at the certiorari stage and below, and hold that petitioners had probable cause as a matter of law based on the established historical facts.

II. Alternatively, The Officers Are Entitled To Qualified Immunity.

Even if probable cause were lacking, qualified immunity applies here. A "reasonable officer could have believed [the arrests] to be lawful, in light of clearly established law and the information . . . officers possessed." *Hunter v. Bryant*, 502 U.S. 224, 227 (1991) (per curiam). Whether the law is clearly established must be considered "in light of the specific context of the case," and under existing precedent the

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[6] While respondents objected below based on hearsay, the petitioner officers, who learned of the tip from other officers, were permitted to rely upon it. *See White v. Pauly*, 137 S. Ct. 548, 552 (2017) (per curiam).

constitutional question must be "beyond debate." *Mullenix v. Luna*, 136 S. Ct. 305, 308 (2015). At base, qualified immunity protects "all but the plainly incompetent or those who knowingly violate the law." *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1867 (2017). Any mistake about the existence of probable cause here was a reasonable one, and exactly the type of mistake for which qualified immunity provides protection.[7]

Seeking only to survive summary judgment against them on this issue, respondents rely on their new attempts to dispute the facts. As discussed, these arguments have been waived or forfeited. (*See supra* at 15-19.) It would be particularly inappropriate to reach these arguments here because a ruling on qualified immunity "should be made early in the proceedings so that the costs and expenses of trial are avoided where the defense is dispositive." *Saucier v. Katz*, 533 U.S. 194, 200 (2001); *see White v. Pauly*, 137 S. Ct. 548, 551 (2017) (per curiam).

In any event, even if *all* of the disputes respondents newly raise had merit, the officers would still be entitled to qualified immunity as a matter of law for two reasons. First, it was unclear at the time that the putative *mens rea* element was an element at all, rather than an affirmative defense. (*See supra* at 14-15.) But second, even if this had been clearly established, respondents concede that only "some evidence" of *mens rea* was necessary. (Resp. Br. 15 n.3.) Even under their cramped view of the historical facts

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[7] A finding of qualified immunity would similarly entitle petitioners to a privilege against the common-law claims, and so independently justify entry of judgment for petitioners on all claims. (Pet. Br. 42 & n.4.) Respondents do not dispute that, if the privilege applies, it defeats all of the common-law claims at issue.

(Resp. Br. 2-3), there was at least *some* evidence of *mens rea* given the essentially unfurnished nature of the house, the activities at the party, and the absence of any homeowner or renter from the scene. The officers' entitlement to qualified immunity becomes even clearer when considering the other facts established below without objection from respondents. (Pet. Br. 43-47; U.S. Br. 24-29.)[8]

Against this, respondents distort petitioners' arguments. Petitioners are not contending that, for the law to be clearly established, there must always be "an existing case identical in its minute particulars." (Resp. Br. 42.) But this is far from the obvious case in which general Fourth Amendment principles would suffice to deny qualified immunity. (Pet. Br. 47-48 (citing cases).) Those principles failed to give the on-scene officers fair notice that the particular facts here did not provide probable cause to arrest. Such notice would have required, at minimum, some precedent finding a Fourth Amendment violation by "an officer acting under similar circumstances." *White*, 137 S. Ct. at 552. Respondents point to no such case. In fact, they embrace the ample case law that *supported* the lawfulness of the arrests. (Resp. Br. 42-45.)

Perhaps most revealing, respondents do not even acknowledge that four judges of the District of Columbia Circuit determined that there was probable

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[8] Respondents do not dispute that Officers Parker and Campanale had the same material information upon which petitioners rely for probable cause. (Pet. Br. 44.) But respondents fail to appreciate that an additional factor supporting qualified immunity is these officers' reliance on their on-scene supervisor's decision to arrest. It was reasonable for them to trust their superior's judgment under these circumstances. (Pet. Br. 49.)

cause for the officers to arrest respondents. (Pet. Br. 48; *see also* U.S. Br. 13-22; States' Br. 5-15.) This alone demonstrates the injustice of imposing a million-dollar judgment on petitioners. (Pet. Br. 48-49; U.S. Br. 29.) The present case is, indeed, a "fairly easy" one for qualified immunity. (Pet. App. 136a.)

CONCLUSION

The Court should reverse the judgment below and direct entry of summary judgment for petitioners or, at minimum, remand for further proceedings.

Respectfully submitted,

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